

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-212953**DATE:** July 24, 1984**MATTER OF:** Bureau of Indian Affairs—Payment of
Judgment Share to Internal Revenue
Service under Notice of Levy**DIGEST:**

The Bureau of Indian Affairs, Department of Interior, is authorized to comply with an Internal Revenue Service Notice of Levy on a Klamath Indian's individual share of a judgment fund distributed under Public Law 89-224, 25 U.S.C. §§ 565-565g. Statutory levy authority of IRS (26 U.S.C. § 6331) applies to funds in hands of another Federal agency, and is not diminished by the terms of the judgment distribution statute in this case.

This responds to a request by the Deputy Assistant Secretary for Indian Affairs, Department of the Interior, for our decision on whether the Bureau of Indian Affairs (BIA) is authorized to pay a Klamath Indian's share of a judgment fund being distributed under Public Law 89-224 to the Internal Revenue Service (IRS) under a Notice of Levy. In the course of preparing our response to the Department's request, we solicited the views of the IRS on this matter and we have considered the comments offered by the Service in formulating this decision. For the reasons stated below, we hold that the Bureau should comply with the Notice of Levy.

Background

On December 20, 1982, the United States Court of Claims rendered a judgment in the amount of \$16,500,000 against the United States and in favor of the Klamath Indian Tribe and others (Docket No. 100-B-2). This Office certified the judgment for payment on January 10, 1983. Public Law 89-224, enacted in 1965, governs the distribution of judgment funds to the Klamath Indians.^{1/} Pursuant to that statute, the BIA divided the judgment fund into individual shares for per capita distribution to each living adult member of the Klamath tribe whose name appeared on the final membership role compiled under the Klamath Termination Act (except in certain cases not relevant here). 25 U.S.C. § 565a. We understand that the Bureau has distributed most of the individualized shares to the persons who are entitled to them.

^{1/} Pub. L. No. 89-224, codified at 25 U.S.C. §§ 565-565g, was enacted to govern the distribution of a 1964 Indian Claims Commission award, but by its terms applies to future judgments as well.

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According to the IRS, one Tribal member, entitled to a share of \$7,454.39, owes \$13,642.23 in delinquent Federal taxes as a responsible person liable for the unpaid trust fund employment taxes due from a corporation of which he was incorporator, stockholder, director, and officer.^{2/} The IRS has levied on the funds in the BIA's possession which the Bureau has individualized as the member's share. The Bureau is holding the share pending our decision.

The Issue

The BIA and the IRS disagree over whether the Bureau may legally comply with the Notice of Levy. The Service's position is that the Internal Revenue Code provisions governing IRS property seizures for tax collections, I.R.C. (26 U.S.C.) §§ 6331 and 6332, and court decisions interpreting them require the Bureau's compliance. The Bureau believes that the statute which prescribes how it must distribute judgment funds to the Klamath Indians, Public Law 89-224 (cited above), prohibits it from complying with the Notice. The Bureau is concerned that it could be liable for breach of trust if it paid over the judgment share in question to the IRS.

Discussion - IRS Statutory Levy Authority

The general authority of the Internal Revenue Service to levy upon delinquent taxpayers' property is clearly provided for in the Internal Revenue Code. Section 6331 specifies that if a taxpayer does not pay any tax he owes within 10 days after notice and demand for payment, it is lawful for the IRS, as the Secretary of the Treasury's delegate, to collect the unpaid tax "by levy upon all property and rights to property belonging to such person * * *." I.R.C. § 6331(a). Subsection (b) defines levy as including "seizure by any means." Section 6332(a) requires any person who is in possession of property or rights to property subject to levy upon which levy has been made, to surrender such property to the IRS. Section 6334(a) lists various exemptions from the levy authority, none of which apply here, and section 6334(c) states that "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

^{2/} Although not specifically raised as an issue, we note that the Tribal member is personally liable for the amount of withholding tax not paid by the corporation of which is is an officer under I.R.C. §§ 6671 and 6672.

The IRS may validly serve a Notice of Levy upon another Government agency which must be honored under sections 6331 and 6332. United Sand and Gravel Contractors, Inc. v. United States, 79-1 U.S.T.C. § 9240 (W. D. La. 1979). In United Sand the plaintiff contended that the Internal Revenue Code did not contemplate the IRS levying upon another agency of the United States and therefore an IRS levy served upon the U.S. Army Corps of Engineers had no effect on the period of limitations which the plaintiff argued was applicable in its suit brought under I.R.C. § 7426. The court rejected the plaintiff's contention stating:

"The IRS does not levy upon the person or the entity in possession of the property; it levies upon the property. 'Levy' is nothing more or less than 'seizure'. Black's Law Dictionary 1051 (4th ed.). The IRS is duty bound to pursue the collection of taxes diligently and has been empowered by Congress to levy 'upon all property' belonging to the taxpayer for the payment of the tax. 26 U.S.C. § 6331.

"Though we are not aware of any cases directly deciding the issue of whether or not the IRS can levy upon property held by another agency of the government, the practice is certainly not uncommon. It often occurs that the IRS levies on property held by the government after a seizure by the government in a criminal proceeding. * * *"

"The IRS has the right to levy against property where it finds it."

In addition, 38 Comp. Gen. 23 (1958), reaching the same result, is squarely on point. In that case, the (then) Post Office Department asked whether a notice of levy served under I.R.C. § 6331 could reach funds in a postal savings account of a delinquent taxpayer. The Post Office Department raised the question because postal savings are trust funds. Holding that the funds were subject to the IRS levy under I.R.C. §§ 6331 and 6334(c), we said:

"In view of the foregoing provisions of law all that is necessary to determine for the purpose of applicability of section 6331(a), is whether postal savings are 'property or rights to property' belonging to the delinquent taxpayer." 38 Comp. Gen. at 24. See also 35 Comp. Gen. 620 (1956).

As the court pointed out in the United Sand case discussed above, if the levy is wrongful, the aggrieved taxpayer has a remedy in the form of a civil action under I.R.C. § 7426.

Accordingly, the Internal Revenue Code authorizes the IRS to levy upon the Klamath Indian's individual judgment share and the Notice of Levy applies to funds in the hands of the BIA, unless there is some independent reason that would preclude application of that authority in this case.

Public Law 89-224

The BIA suggests that Public Law 89-224 may prohibit it from paying a Klamath Indian claimant's share to his creditors, including the IRS. The Bureau bases its view primarily upon its interpretation of section 2 of the Act, 25 U.S.C. § 565a, which provides:

"A distribution shall be made of the funds * * * to all persons whose names appear on the final rolls of the Klamath Tribe * * *. Except as provided in subsection (b), (c), (d), and (e) of this section, a share or portion of a share payable to a living adult shall be paid directly to such adult; (b) a share payable to a deceased enrollee shall be paid to his heirs or legatees * * * (c) a share payable to an adult under legal disability shall be paid to his legal representative; (d) a share payable to a person previously found to be in need of assistance * * * may be paid directly to the individual or, * * * it may be added to the trust now in force on behalf of said individual * * * and (e) a share * * * payable to a person under age of majority * * * shall be paid to a parent, legal guardian, or trustee of such minor." (Emphasis added.)

The Bureau argues that by using the word "directly" in the emphasized phrase, the Congress indicated its intention that the BIA be prohibited from disbursing an enrollee's share to any of his creditors, including the United States. If it is directed to pay a share directly to an enrollee, it is precluded from paying it to anyone else, the Bureau reasons.

We disagree with this interpretation. When the context of 25 U.S.C. § 565a is viewed as a whole, it seems clear that the Congress used the word "directly" to indicate merely that payments should be made to the individual rather than to someone else on that individual's behalf in some trust or fiduciary capacity, except in the specific situations noted in subsection (b) through (e).

Nothing in the legislative history suggests a different reading. The use of the word "directly" again in the same context in subsection (d) reinforces this interpretation.

In addition, an opinion by the BIA Regional Solicitor's office, Pacific Northwest Region, included with the submission, takes the position that the legislative history of Public Law 89-224 also supports the Department's conclusion that Congress intended the Secretary of the Interior to distribute Klamath judgment funds only to the enrollees and not to their creditors, including the United States. The Regional Solicitor notes that the bill which became Public Law 89-224 (S. 664, 89th Cong., 1st Sess.) and others which Congress considered along with it, originally contained a provision which specifically addressed the question of the payment of judgment shares to enrollees' creditors. It provided:

"No part of any of the funds distributed per capita shall be subject to any lien, debt, or claim of any nature whatsoever, except delinquent debts owed to the United States * * *" S.664, 89th Cong., 1st Sess. § 8 (1965).

This provision was not in the final version of the bill which Congress enacted. The Regional Solicitor argues that "the intentional deletion of language which would have expressly permitted the disbursement of these funds to pay a debt which the distributee owed to the United States is persuasive that Congress considered such a distribution and concluded that these funds should not be distributed in such a manner."

The legislative history is completely silent on the reasons for the deletion of the "debt" provision. Thus, while it can perhaps be argued, as BIA does, that the deletion was intended to insulate payments against liability for delinquent Federal taxes, it is at least equally arguable that the deletion was designed to remove statutory insulation for non-Federal debts. Without any explanation in the legislative history, we view the deletion of the debt provision as inconclusive. Also, it is significant to note that the deleted debt provision would not have created the liability for delinquent Federal debts. That liability already existed. The deleted provision would simply have made it clear that the protection against liability for non-Federal debts did not extend to delinquent Federal debts.

To test our interpretation, we reviewed a number of other Indian judgment fund distribution statutes. We found several that use the word "directly" in the same manner as 25 U.S.C § 565a, and

that also include a debt provision similar to the one that was deleted from S.664. See, for example, 25 U.S.C. §§ 773(a) and (c) (certain Indian Tribes of Oregon); 25 U.S.C. §§ 873(a) and (c) (Otoe and Missouri Indians); 25 U.S.C. §§ 964(a) and 965 (Omaha Tribe); 25 U.S.C. §§ 992 and 995 (Cherokee Nation). If the word "directly" had the meaning ascribed to it by BIA, a separate provision insulating the funds from liability for non-Federal debts would have been unnecessary. In other words, if BIA were correct, it would follow that the word "directly" would be missing in those statutes that included the debt provision. We also found instances where the word "directly" is used without a debt provision. E.g., 25 U.S.C. §§ 788c and 788g (Creek Nation); 25 U.S.C. § 1035 (Shawnee Tribe). Our review reinforces our conclusions that (1) the term "directly" in the distribution formula has no bearing on the liability of the funds for the distributee's indebtedness, and (2) when Congress wishes to protect judgment funds from liability for indebtedness, it has done so by the inclusion of specific provisions to that effect.

We therefore find nothing in Public Law 89-224 that lessens the applicability of section 6331 of the Internal Revenue Code.

Compliance Not Breach of Trust

The Department is also concerned that complying with the Notice of Levy would constitute an actionable breach of trust. It notes that in United States v. Mitchell, 77 L. Ed. 2d 580 (1983), the Supreme Court held that the BIA acts as a trustee when managing Indian property or funds under statutory direction and that the United States is liable for money damages for breach of that trust. The Department is concerned that it will be in breach of trust if it pays a share of the judgment fund to anyone other than those persons specified in section 2 of Public Law 89-224.

Mitchell was a suit brought by Quinault Reservation allottees against the United States for alleged mismanagement of Reservation timber lands by the Department of the Interior. Under various statutes and regulations, the Department was responsible for continually managing Reservation timber on a sustained yield basis and for selling the timber based "upon a consideration of the needs and best interests of the Indian owner and his heirs." The allottees alleged that the Department had mismanaged their timber lands by failing, among other things, "to obtain a fair market value for timber sold, failing to manage timber on a sustained-yield basis, failing to obtain any payment at all for some merchantable timber and failing to develop a proper system of roads and easements for timber operations." Acting on the United States' motion to dismiss, the Court ruled that the statutes and regulations requiring the

Department to manage timber for the Indians' benefit established fiduciary obligations on the Department and that the Government would be liable for money damages for breach of trust if the allottees' allegations were proven.

We do not read the Mitchell decision as in any way inconsistent with our decision in this case. The basis for the holding in Mitchell was that the underlying statutes involved in that case created a fiduciary duty. While we do not question that the BIA acts generally in a trust capacity when it holds funds on behalf of Indian Tribes or individual Indians, the underlying statute in this case, Public Law 89-224, as we have discussed, does not impose upon the BIA a duty to make payment in disregard of a statutory levy for delinquent Federal taxes. Thus, honoring the IRS Notice of Levy would not violate the BIA's trust responsibility.

In sum, for the reasons discussed above, we conclude that the BIA should pay over the funds in question to the IRS pursuant to the Notice of Levy issued under the authority of 26 U.S.C. § 6331.

Milton J. Fowler
for Comptroller General
of the United States